STATE OF MICHIGAN

COURT OF APPEALS

DANOU TECHNICAL PARK, L.L.C., Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED June 24, 2014
v	No. 309905 Wayne Circuit Court
FIFTH THIRD BANK, Defendant-Appellee/Cross-Appellant.	LC No. 11-003922-CZ

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Plaintiff, Danou Technical Park, LLC ("Danou Technical"), appeals as of right the trial court's order granting summary disposition to defendant, Fifth Third Bank ("Fifth Third"), under MCR 2.116(C)(7), and denying summary disposition to plaintiff, on the basis that res judicata bars plaintiff's cause of action. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arose out of a dispute over a foreclosure action. The underlying dispute was resolved in an earlier action, as summarized in this Court's opinion of March 2012. See *Fifth Third Bank v Danou Technical Park, LLC & SMD Estate, Inc*, unpublished opinion per curiam, decided March 20, 2012 (Docket No. 303884). The opinion presented detailed facts, which need not be reiterated here. *Id*., unpub op at 1-4. In the opinion, this Court held that Fifth Third Bank was entitled to summary disposition and to an order quieting title on the property at issue. *Id*. at 8-9.

Subsequently, Danou Technical filed the instant cause of action against Fifth Third seeking a return of allegedly surplus proceeds from the foreclosure by advertisement sale, MCL 600.3252, equal to the amount of the delinquent taxes and attorney fees included in Fifth Third's credit bid. The trial court granted Fifth Third's motion for summary disposition, denied Danou Technical's motion for summary disposition, and summarily dismissed Danou Technical's cause of action under MCR 2.116(C)(7), concluding that it was barred by res judicata because the claim for surplus could have been litigated in the earlier action. This appeal ensued.

II. STANDARD OF REVIEW

We review "de novo a trial court's decision with regard to a motion for summary disposition under MCR 2.116(C)(7)." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). "When considering a motion brought under MCR 2.116(C)(7), it is proper for this Court to review all the material submitted in support of, and in opposition to, the plaintiff's claim." *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 222; 779 NW2d 304 (2009) (citations omitted). "In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Id.*, 286 Mich App at 222-223 (citations omitted). Additionally, the applicability of res judicata is a question of law subject to de novo review. *Washington*, 478 Mich at 417.

III. RES JUDICATA

Plaintiff claims that the trial court erred in deciding that res judicata barred this instant cause of action. We disagree.

"The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Washington*, 478 Mich at 418, quoting *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Our Courts have "taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised, but did not." *Washington*, 478 Mich at 418, quoting *Adair*, 470 Mich at 121. Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Washington*, 478 Mich at 418, quoting *Adair*, 470 Mich at 121. Additionally, the first action must have resulted in a final decision. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). We must consider these requirements in determining whether res judicata bars plaintiff's instant cause of action. *Washington*, 478 Mich at 418.

A. PRIOR ACTION WAS DECIDED ON THE MERITS

Regarding the first element of res judicata, we find that the earlier action was decided on the merits, and the judgment is final. *Washington*, 478 Mich at 418; *Adair*, 470 Mich at 121. Specifically, in the earlier action, the trial court decided the issues raised by the parties, granted the summary disposition motion brought by Danou Technical and its assignee, SMD, denied Fifth Third's motion for summary disposition, and dismissed Fifth Third's complaint in its entirety with prejudice. This Court reversed and remanded. *Fifth Third*, unpub op at 9. A dismissal with prejudice normally constitutes a final judgment on the merits and bars a later suit. *Wilson v Knight-Rider Newspapers, Inc*, 190 Mich App 277, 279; 475 NW2d 388 (1991). Further, "a summary disposition ruling is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata." *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004), overruled in part on other grounds *Titan Ins Co v Hyten*, 491 Mich 547, 555 n 4; 817 NW2d 562 (2012).

B. BOTH ACTIONS INVOLVE SAME PARTIES OR THEIR PRIVIES

Regarding the second element of res judicata, we conclude that the earlier and instant actions involve the same parties or their privies. *Washington*, 478 Mich at 418, 421; *Adair*, 470 Mich at 121. "[O]nly parties to the former judgment or their privies may take advantage of or be bound by it." *Duncan v State Highway Comm*, 147 Mich App 267, 271; 382 NW2d 762 (1985) (internal quotation and citation omitted). Danou Technical brought the instant cause of action against Fifth Third seeking a return of the alleged surplus proceeds resulting from the foreclosure sale of the subject property. In the earlier action, Fifth Third brought suit to quiet title in the foreclosed property against Danou Technical and its assignee, SMD, who then filed a counterclaim against Fifth Third. Although Danou Technical was not a named party to SMD's counterclaim, this fact "does not forestall the application of the doctrine of res judicata" because Danou Technical was an "active participant" in the first lawsuit. *Bousson v Mitchell*, 84 Mich App 98, 102; 269 NW2d 317 (1978). "A party in this connection [for purposes of res judicata] is one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment."' *Duncan*, 147 Mich App at 271, quoting *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 42-43; 191 NW2d 313 (1971).

The asserted rights and interests of Danou Technical and SMD in the earlier action were clearly intertwined because SMD, as Danou Technical's assignee, is the successor in interest to Danou Technical's rights and interest in the API Mortgage and Note. See *Professional Rehabilitation Ass'n v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998) (An assignee acquires the assignor's rights and stands in the assignor's shoes.) Thus, Danou Technical, as SMD's assignor, had a "direct interest" in the subject matter of SMD's counterclaim, even though it was not a named party. *Duncan*, 147 Mich App at 271. In fact, the trial court, in deciding Danou Technical's and SMD's jointly filed motion for summary disposition, actually adjudicated Danou Technical's rights in the earlier action. As a named defendant in the earlier action, Danou Technical had a right to defend against Fifth Third's earlier action, assert a defense, control the earlier proceedings, and appeal from the trial court's judgment. *Duncan*, 147 Mich App at 271.

Furthermore, Danou Technical clearly actively participated in the earlier litigation as evidenced by its motion for summary disposition, which was filed together with SMD and asserted Danou Technical's rights and interest in the subject matter raised in SMD's counterclaim, as well as its representation by an attorney at the hearing. *Duncan*, 147 Mich App at 271; *Bousson*, 84 Mich App at 102. On these facts, it is difficult to argue that Danou Technical was not a "party" to the earlier action for res judicata purposes. Thus, we find that both the earlier and instant actions involve the same parties, Danou Technical and Fifth Third, who were clearly adversarial in both cases.[1] *Washington*, 478 Mich at 418, 421; *Gomber v*

[1] Additionally, as the trial court properly determined, SMD, as Danou Technical's assignee, is a privy of Danou Technical. "[A] privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee." *Peterson Novelties v City of Berkley*, 259 Mich App 1, 13; 672 NW2d 351 (2003). In the earlier action, Danou Technical and SMD clearly had a substantial identity of interests in the rights to the API Mortgage and Note, as well as a working and functional relationship in which Danou Technical's interests were presented and protected by

Dutch Maid Dairy Farms, Inc, 42 Mich App 505, 511-512; 202 NW2d 566 (1972). The purpose of the same party requirement — to ensure that the interests of the parties absent from prior litigation were adequately protected — is satisfied here, where Danou Technical asserted and defended its interests and rights in the earlier action. *Peterson*, 259 Mich App at 13.

C. MATTER WAS OR COULD HAVE BEEN RESOLVED IN EARLIER ACTION

Regarding the final element of res judicata, although the theories and claims asserted in both actions clearly differ, our Courts apply res judicata broadly, utilizing "a transactional test to determine if the matter could have been resolved in the first case." *Washington*, 478 Mich at 420; *Adair*, 470 Mich at 123, 125. Under Michigan's transactional test, the assertion of different kinds of theories of relief constitutes a single cause of action if a single group of operative facts gives rise to the assertion of relief. *Adair*, 470 Mich at 125. "Whether a factual grouping constitutes a 'transaction' for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin, or motivation [and] whether they form a convenient trial unit." *Adair*, 470 Mich at 125 (quotation and citation omitted, emphasis removed); see also, *Washington*, 478 Mich at 420. Thus, "under Michigan's same transaction test, whether evidence necessary to support a first lawsuit differs from evidence necessary to support the subsequent suit is not dispositive." *Adair*, 470 Mich at 124-125.

First, we find that the operative facts supporting the earlier and instant actions are related in origin because both actions arose out of or originated from the May 2009 foreclosure of Fifth Third's mortgage securing the subject property and concern the foreclosure and the underlying mortgages and notes securing the property. *Washington*, 478 Mich at 420; *Adair*, 470 Mich at 125. The instant cause of action seeks recovery of the alleged surplus proceeds from the foreclosure by advertisement sale equal to the attorney fees and delinquent property taxes included in the amount of Fifth Third's credit bid, and thus, directly arose or originated from the 2009 foreclosure sale. The claims raised by Danou Technical and its assignee, SMD, in the earlier action also arose or originated from the May 2009 foreclosure sale, albeit less directly. In the earlier action, SMD and Danou Technical asserted its rights and interest in the foreclosed property and claimed that Fifth Third's full credit bid at the foreclosure sale fully satisfied Danou Technical's mortgage debt and extinguished its mortgage. This triggered the discharge or release of Danou Technical's previous assignment of the API Mortgage and Note to Fifth Third, allowing Danou Technical to then assign the API Mortgage and Note to SMD, which then led to SMD's assertion of its rights and interest in the foreclosed property under the API Mortgage and Note encumbering the property. Accordingly, the basis or origin of SMD and Danou Technical's asserted right of action in the earlier litigation is also Fifth Third's full credit bid at the foreclosure by advertisement sale, without which SMD could not assert its right and interest in the foreclosed property under the API Mortgage. Thus, we find that the facts of both cases share

---

SMD's counterclaim and their jointly filed motion for summary disposition. *Peterson*, 259 Mich App 13.

a common origin — Fifth Third's full credit bid made at the 2009 foreclosure sale. *Washington*, 478 Mich at 420; *Adair*, 470 Mich at 125.[2]

Next, we find that the operative facts supporting both actions are related in time and space. *Washington*, 478 Mich at 420; *Adair*, 470 Mich at 125. The operative facts supporting the earlier action include the May 2009 foreclosure sale of the subject property, Danou Technical's March 2001 assignment of its rights and interest in the API Mortgage securing the property to Fifth Third, Danou Technical's August 2001 grant of a mortgage to Fifth Third securing the subject property, and Danou Technical's November 2009 post-foreclosure assignment of its alleged interest in the API Mortgage and Note securing the subject property to SMD. Likewise, the operative facts supporting Danou Technical's instant cause of action seeking recovery of the alleged proceeds from Fifth Third's bid amount in excess of its debt obligation, involve events occurring in 2001 and 2009, i.e., Fifth Third's May 2009 foreclosure of its mortgage securing the subject property and the August 2001 mortgage between Danou Technical and Fifth Third, which set forth the parties' rights and obligations under the mortgage and underlying note. Thus, the operative facts supporting both cases involve occurrences in 2001 and 2009, and therefore, are sufficiently related in time and space. *Washington*, 478 Mich at 420; *Adair*, 470 Mich at 125.

We also find that the facts are related in motivation. *Washington*, 478 Mich at 420. While the parties' motivations for bringing their causes of action clearly differ,[3] the operative facts are arguably related in motivation because in order to obtain the relief sought in both actions, Danou Technical needs to show that Fifth Third's bid fully satisfied its mortgage debt, a fact which then triggers the events leading to the assertion of Danou Technical's rights in both actions. *Washington*, 478 Mich at 420; *Adair*, 470 Mich at 125.

On this record, we agree with the trial court that the elements of res judicata are satisfied. The earlier action was finally decided on the merits, both actions involve the same adversarial parties, Danou Technical and Fifth Third, and the matters at issue in this case could have been resolved in the earlier case. *Washington*, 478 Mich at 418; *Adair*, 470 Mich at 121. Although

---

[2] We reject Danou Technical's contention that the operative facts of the earlier action, for res judicata purposes, are limited to the facts underlying this Court's reversal of the trial court's decision in the earlier action. In our earlier opinion, we relied only on the August 2001 conveyance of the property from API to Danou Technical and not on the 2009 foreclosure sale as the trial court had done. The focus of the transactional test used to determine if the matter raised in the subsequent action could have been resolved in the first action is on the operative facts giving rise to the theories and relief asserted. *Adair*, 470 Mich at 125; *Washington*, 478 Mich at 418, 420. As previously discussed, the theories *asserted* by Danou Technical and SMD in the first action and asserted by Danou Technical in the instant action concern the 2009 foreclosure.

[3] The obvious motivation of Danou Technical and its assignee, SMD, in the earlier action, is their desire to claim SMD's alleged superior interest in the foreclosed property, while Danou Technical's motivation in the instant action is its desire to recover the alleged surplus proceeds resulting from Fifth Third's successful bid at the foreclosure sale.

the earlier and instant actions involve different claims and theories of relief, both actions involve the same operative facts giving rise to the assertion of the right to relief, i.e., the foreclosure sale and the underlying notes and mortgages securing the foreclosed property. *Adair*, 470 Mich at 125. When the operative facts supporting the claims in both actions are considered pragmatically, we believe they would form a convenient trial unit because they are sufficiently related in origin, time, space, and motivation. *Washington*, 478 Mich at 420; *Adair*, 470 Mich at 124-125. We take "a broad approach to the doctrine of res judicata, holding that it bars . . . every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 470 Mich at 121.[4] The trial court properly determined that res judicata bars Danou Technical's instant cause of action.

D. ALTERNATIVE ARGUMENTS

We are not convinced that the additional arguments set forth by Danou Technical warrant preclusion of the application of res judicata to bar the instant cause of action. First, we agree that, under MCR 2.203(A), governing the compulsory joinder of claims, Danou Technical was not required to bring this instant claim against Fifth Third in the earlier action because Danou Technical was not a "pleader" required to join every claim that it has against the opposing party arising out of the same transaction or occurrence. Nevertheless, although the joinder rule does not apply, Danou Technical was required to raise this claim in the earlier action under the broadly applied doctrine of res judicata operating to bar claims raised in a subsequent case when those claims arose out of the same transaction and the parties, exercising reasonable diligence, could have litigated in a prior action but did not. *Peterson*, 259 Mich App at 11.

We also disagree with Danou Technical's argument that Fifth Third waived its res judicata defense by failing to timely assert it as an affirmative defense in its answer to Danou Technical's original complaint. "Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.111(F)(3). Although Fifth Third did not raise its res judicata defense in its first responsive pleading to Danou Technical's original and first amended complaints, there "is no requirement that these grounds be raised in the party's 'first' responsive pleading. Thus, they are subject to the court's authority to grant permission to amend the [answer] to add the defense under MCR 2.118." 1 Martin, Dean & Webster, Michigan Court Rules Practice, p 300. Here, the trial court granted Danou Technical's motion for leave to file an amended complaint to add a claim. Fifth Third asserted its defense of res judicata in its first responsive pleading to the amended complaint Danou Technical filed in accordance with the trial court's order granting leave to amend the parties' pleadings. Under MCR 2.118(A)(4), an amended pleading supersedes the former pleadings. Accordingly, because Fifth Third alleged its res judicata defense in its responsive pleading to Danou Technical's amended complaint in accordance with the trial court's order, Fifth Third timely asserted and did not waive its res judicata defense. See *Harris v*

[4] We note that the record reveals that Danou Technical was aware, during the earlier litigation, of its claim asserted in the instant action because Danou Technical and SMD's summary disposition motion filed in the earlier action referred to the claim.

Lapeer Public Sch Sys, 114 Mich App 107, 113; 318 NW2d 621 (1982). Additionally, Danou Technical's assertion that the amended affirmative defense of res judicata does not "relate back" to the original pleading lacks merit. The relation-back doctrine of MCR 2.118(D), requiring that an amendment that adds a claim or defense relates back to the date of the original pleading, applies to claims that would otherwise be barred by the statute of limitations, and thus, is not applicable here. *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996).

We also reject Danou Technical's assertion that res judicata should not operate to bar its instant action because it involves solely issues of law. Danou Technical's reliance on *Monat v State Farm Ins Co*, 469 Mich 679, 680, 682-684; 677 NW2d 843 (2004), is misplaced because *Monat* involved the doctrine of collateral estoppel, which precludes the relitigation of an issue in a subsequent case between the same parties where the issue is actually determined in the prior case, whereas the instant case involves the application of res judicata, barring a subsequent claim that could have been litigated in the first case. *Adair*, 470 Mich at 121. Further, Danou Technical's reliance on *Young v Edwards*, 389 Mich 333; 207 NW2d 126 (1973), to support its argument that res judicata does not bar the litigation of issues of law is not convincing. While the Court in *Young*, 389 Mich at 337-338, quoting Restatement Judgments, § 70, pp 318-319, recognized that "[w]here questions of law are involved, the courts have been reluctant to apply the rule of res judicata," *Young* involved the re-litigation of the same issue of law that arose out of different transactions, and thus, is also distinguishable from this case, which involves different issues of law that arose out of the same transaction, i.e., the 2009 foreclosure by advertisement sale.

We also disagree with Danou Technical's argument that res judicata should not operate to bar this instant cause of action because it prevents a legal decision regarding whether a mortgagee can properly include attorney fees and unpaid delinquent taxes in its full credit bid at the foreclosure by advertisement sale, which, in light of the multitude of foreclosures in Michigan, concerns an issue of substantial public policy. Danou Technical and Fifth Third, however, are private parties litigating their rights under private loan agreements and mortgages. We do not believe the public interest is at stake to warrant preclusion of the doctrine of res judicata in the instant case on public policy grounds.

Plaintiff's cause of action is barred by res judicata, and the trial court properly granted summary disposition under MCR 2.116(C)(7). Given our resolution of the res judicata issue, we need not address the other issues the parties raised on appeal.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey